No. 83-2018

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOSE ANTONIO RUIZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the X-ray examination at an airport of petitioner's checked luggage, because it was reasonably suspected of containing a firearm, constituted an unreasonable search and seizure.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A7) was entered on January 3, 1984. A petition for rehearing was denied on February 13, 1984 (Pet. App. A6). The petition for a writ of certiorari was filed on April 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possession of an unregistered automatic weapon, in violation of 26 U.S.C. 5861(d), 5871 (Count I);

delivery of a container containing a firearm to a common carrier without affording the carrier the necessary notice, in violation of 18 U.S.C. 922(e), 924(a) (Count II); and possession of cocaine, in violation of 21 U.S.C. 844 (Count III) (Pet. App. A1-A2). He was sentenced to a five-year term of imprisonment on Count I, a 10-year term on Count II, and a one-year term on Count III to run concurrently with the sentence imposed on Count II but consecutively to the sentence imposed on Count I. The trial court suspended the sentences imposed on Counts II and III and placed petitioner on five years' probation to commence upon his discharge from incarceration.[1] The court of appeals affirmed (Pet. App. A1-A5).

1. As summarized in the decision of the court of appeals (Pet. App. A1-A4), the evidence at the suppression hearing showed that on January 26, 1982, petitioner and a female companion approached the X-ray machine at the Fort Lauderdale-Hollywood International Airport as they were proceeding to board a flight to New York City's La Guardia Airport. As petitioner's carry-on luggage passed through the X-ray, the security guard observed an object that appeared to be a handgun and summoned an officer of the Broward County Sheriff's Department (Tr. 6-7). When the officer asked petitioner to describe what the object was, he replied that it appeared to be a gun. At the officer's direction, petitioner then removed the weapon along with two magazines and 37 loose rounds of ammunition, explaining that his mother must have placed them in the bag without his knowledge when she was packing it the night before (Tr.

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[1]The district court's sentencing order failed to specify whether the 10-year sentence on Count II was to run consecutively to or concurrently with the five-year sentence imposed on Count I. Presumably, because excecution of the sentence was suspended and the term of probation was not to commence until completion of the sentence on Count I, the sentence on Count II is consecutive and not concurrent.

7-8). After being taken to the airport police office, petitioner stated that the pistol belonged to his brother-in-law. The brother-in-law was contacted, however, and stated that he had sold the weapon to petitioner two years ago (Tr. 9-10, 30). Petitioner was then arrested, charged with a misdemeanor, and released (Tr. 15, 25-29).

While petitioner was being processed by the police, his companion took their airline tickets to attempt to arrange for rebooking on the next flight to New York. However, she was unable to do so because the tickets were in another name. Upon her return, she informed a police officer of this, and the officer confiscated the tickets. Before petitioner departed, the police learned that he had a record of three previous arrests, and they charged him with the felony of carrying a concealed firearm (Tr. 14, 17-18, 23, 30, 36-39). One of the officers then directed petitioner to open his carry-on bag for an inventory of its contents. When petitioner refused, the officer forced the bag open and found that it contained several false identification cards (Tr. 31, 41, 98, 101).

Fearing that there might also be a weapon or explosive device in the baggage that petitioner had checked on the flight, an officer telephoned an employee of Eastern Airlines at La Guardia Airport, told him of the circumstances of petitioner's arrest, and requested that he intercept petitioner's bag and X-ray it as a precautionary measure (Tr. 42-43, 47). Following the arrival of petitioner's flight at La Guardia, the airline employee informed the Fort Lauderdale police that he had secured the luggage, but was unable to open the combination lock. The employee then put the officer on "hold" and placed the bag under an X-ray machine. Thereupon, he observed what appeared to be the barrel and receiver of an automatic weapon (Tr. 48, 56-57, 60-64). Approximately 15 minutes elapsed between the time

the airline employee obtained the bag and when he examined it with the X-ray machine (Tr. 63-64).

In accordance with instructions from the Fort Lauderdale police, the Eastern employee then put the bag on a return flight to Fort Lauderdale. When it arrived the following day, further X-rays confirmed the apparent presence of an automatic weapon inside. Tr. 48-49, 57, 64, 68-69. The officers then obtained a search warrant from a magistrate and searched the bag, which contained an automatic firearm and 73 grams of cocaine (Pet. App. A4).

2. The district court denied the motion to suppress the automatic weapon and the cocaine (Tr. 97-100; Pet. 8).[2] The court held that, although the X-ray was a "search," it was "as inobstrusive [*sic*] as a stop and frisk" and hence could validly be performed on the basis of the reasonable suspicion that existed here (Tr. 99). The court of appeals affirmed in an unpublished opinion (Pet. App. A1-A5). It held that under *United States* v. *Place*, No. 81-1617 (June 20, 1983), and *Terry* v. *Ohio*, 392 U.S. 1 (1968), the "actions [of the police] were reasonable under all of the circumstances presented in this case * * *" (Pet. App. A4).

ARGUMENT

Petitioner contends (Pet. 10-16) that, absent exigent circumstances, the seizure and subsequent X-ray examination of his luggage at La Guardia Airport without first obtaining a warrant violated the Fourth Amendment. This claim was correctly rejected by both courts below and does not warrant further review.

1. It cannot seriously be contended that petitioner's bag was illegally *seized* when the airline employee examined it.

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[2]The court, however, suppressed the documents found in petitioner's carry-on bag following his second arrest on the ground that the search did not constitute a valid inventory search (Tr. 97-98; Pet. App. A3).

Only in the most technical sense can the bag be said to have been seized at all since the airline employee had it in his custody for only about 15 minutes before he discovered that a gun apparently was inside. That is a length of time that any traveler could expect to wait for his checked luggage until it arrived on the baggage carousel; it does not constitute a dispossession of the voluntarily checked luggage. Cf. *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970). In any event, petitioner was not at La Guardia Airport waiting for his luggage; he was in lawful custody in Florida. Thus, the examination of the bag at La Guardia did not intrude at all on his "liberty interest in proceeding with his itinerary" (*United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 12) and was not in any practical sense a seizure of his bag.

Even if the X-ray examination is treated as a seizure, it plainly was lawful. In *Place*, the Court held that the principles of *Terry* v. *Ohio*, 392 U.S. 1 (1968), permit the seizure of luggage on the basis of reasonable, articulable suspicion that the luggage contains contraband or evidence of a crime "for the purpose of pursuing a limited course of investigation, short of opening the luggage, that would quickly confirm or dispel the authorities' suspicion." *Place*, slip op. 5. Thus, a government agent is authorized, on the basis of reasonable suspicion alone, "to detain * * * luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope" (*id.* at 10). Petitioner does not dispute that the detention of his checked luggage at La Guardia Airport was based upon reasonable suspicion, nor does he contend that its duration (15 minutes until probable cause was clearly

established) was unreasonable.[3] Hence, there can be no doubt that no unlawful seizure occurred there.

2. a. By the same token, the X-ray examination of the suitcase by the Eastern Airlines employee at the behest of the police did not violate the Fourth Amendment even though probable cause was lacking at the time. An X-ray examination may reveal some limited information about the contents of luggage other than whether it contains contraband, and thus it is properly classified as a "search" within the meaning of the Fourth Amendment. See *United States* v. *Haynie*, 637 F.2d 227, 230 (4th Cir. 1980); *United States* v. *Henry*, 615 F.2d 1223, 1227-1228 (9th Cir. 1980); cf. *United States* v. *Jacobsen*, No. 82-1167 (Apr. 2, 1984), slip op. 12-14; *United States* v. *Place*, slip op. 10-11. However, the X-ray examination — whose purpose is solely to protect the safety of airline passengers by detecting guns and explosives (see *Henry*, 615 F.2d at 1228) — is an unusually unobtrusive kind of search. It does not involve opening the bag or physical contact with the contents, and, by design, it reveals far less information about them than an actual opening and search of the bag. As the Ninth Circuit noted in *Henry*, the X-ray scan "reflects an improvement in technology * * * which helps insure that the screening process is no more extensive nor intensive than necessary" to detect guns or explosives to ensure the safety of airport patrons. 615 F.2d at 1228.

Given the very limited privacy intrusion involved in an X-ray examination, one that is designed to obviate the need for the more severe intrusion of opening the luggage, the

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[3]Once the X-ray examination established probable cause to believe that an automatic weapon was present in petitioner's suitcase, it plainly was lawful to continue the detention for a period sufficient to procure a search warrant. See *Arkansas* v. *Sanders*, 442 U.S. 753, 761 (1979); *United States* v. *Chadwick*, 433 U.S. 1, 13 (1977).

courts below correctly concluded that the officers acted reasonably in requesting that the checked luggage be subjected to an X-ray based on the articulable suspicion that existed. In *Terry* v. *Ohio, supra,* this Court explicitly recognized that there may be some Fourth Amendment intrusions that are properly characterized as "searches" (see 392 U.S. at 16), but that nonetheless may be lawfully performed on the basis of reasonable suspicion. And this principle plainly is not limited to frisks. See *Michigan* v. *Long,* No. 82-256 (July 6, 1983).[4] The X-ray examination here is very closely analogous to the frisk approved in *Terry.* Both situations involve a very limited invasion of an individual's privacy that is designed only to detect the presence of weapons. As in *Terry,* the X-ray examination here was limited to that necessary to detect a weapon or explosive device that would pose a safety threat and was considerably "less than a 'full' search" (392 U.S. at 26). Indeed, the X-ray examination is considerably less intrusive than the frisk, both because it is less likely to reveal information other than the presence or absence of weapons and because it does not involve the physical contact that the Court in *Terry* noted was a "severe * * * intrusion" and "an annoying, frightening, and perhaps humiliating experience" (*id.* at 24-25; see also *id.* at 16-17). Thus, in view of the limited intrusion involved and the particular security interests that necessitate the prompt discovery of weapons or explosives at an

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[4]The courts of appeals have recognized in a variety of contexts that an activity may be permitted on the basis of reasonable suspicion even if it is characterized as a search within the meaning of the Fourth Amendment. See, *e.g., United States* v. *Allen,* 675 F.2d 1373, 1381 (9th Cir. 1980), cert. denied, 454 U.S. 833 (1981) (helicopter surveillance); *United States* v. *Michael,* 645 F.2d 252, 258 (5th Cir.) (en banc), cert. denied, 454 U.S. 950 (1981) (beeper installation and monitoring); *United States* v. *Johnson,* 413 F.2d 1396, 1400 (5th Cir. 1969), aff'd en banc, 431 F.2d 441 (1970) (inspection of automobile vehicle identification number; *United States* v. *Graham,* 391 F.2d 439, 442-443 (6th Cir. 1968) (same); *Cotton* v. *United States,* 371 F.2d 385, 393-394 (9th Cir. 1967) (same).

aircraft facility, the police acted reasonably here in requesting an X-ray inspection of the checked luggage for the purpose of confirming or dispelling the reasonable suspicion that it contained a firearm, and the courts below correctly found that they did not violate the Fourth Amendment.[5]

b. Moreover, petitioner had a considerably reduced expectation of privacy in the contents of his luggage once he checked it with the airline. At that point, he turned over custody and control of the luggage to an entity charged with a paramount duty of ensuring the safety of airline passengers. Indeed, federal regulations specifically require airlines to maintain a screening system to prevent the carriage of any explosive or incendiary device in checked baggage (14 C.F.R. 108.9(a)), under which "passengers may be required to submit their [checked] baggage to inspection." 41 Fed. Reg. 10911 (1976). Thus, petitioner had no expectation that the airline would not expose his checked luggage to an X-ray examination as part of its security program. See Tr. 63 (airline employee here suggested X-raying petitioner's bag "as we would any baggage"). Compare *United States* v. *Gumerlock*, 590 F.2d 794, 799 & n.17 (9th Cir. 1979) (search of air freight package authorized by tariff). Given this extremely limited expectation of privacy, it was

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[5]Petitioner suggests (Pet. 12) that his constitutional rights were violated because the airline official intended to open the suitcase and attempted to do so before he used the X-ray machine. However, this fact is surely irrelevant. First, it is the objective reasonableness of the actual conduct in question that determines whether there is a Fourth Amendment violation, not the motivation of the person involved. See *Scott* v. *United States*, 436 U.S. 128, 136 & n.10 (1978). In any event, the officer here testified that he did not request the airline official to open the bag, only to X-ray it (Tr. 42, 54). In the absence of a district court finding that this testimony was not credible, any attempt by the airline official to open the bag is properly characterized as a private search that does not implicate the Fourth Amendment.

surely reasonable for the police to request the airline to conduct an X-ray screening of petitioner's bag when they acquired an articulable suspicion that it contained a weapon.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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